

Voluntary Contacts

Tim: Hello. I'm Tim Miller. And this is Part II of our podcast series on investigative traffic stops.

In our last podcast, we covered some basic Constitutional law. Now let's put that law to use.

With me today is Greg Coffel. Greg is a member of the Federal Law Enforcement Training Center's Driver and Marine Division. Greg was also a uniformed officer with ____ for ____ years before coming to the Federal Law Enforcement Training Center to train officers and agents like you.

Miller: Greg, tell us a little more about yourself.

Greg:

I was with the Camden County Sheriffs office for about 11 years. I joined right out of high school. I was a patrolman and a canine handler.

Tim: Officer Coffel and I have created a story for you -- our listeners. We are going to pretend that Officer Coffel is a patrolman and a member of a drug interdiction task force. Greg is patrolling Highway 66 and looking for drug traffickers.

In our story, I will pretend to be driving east on Highway 66. We will pretend that Highway 66 extends east and west over the southern half of the United States. I started my trip in Texas and I am traveling east to Florida. I'm on a business trip. What's my business? I'm a drug trafficker. I have controlled narcotics in the trunk of my car. And for about 6-miles, I've watched Officer Coffel in my rear-view mirror. Officer Coffel is following me in a police cruiser.

I'm driving a late model mid-size rental vehicle -- a grey Chevy Impala with Texas plates. And I was really enjoying the drive until I noticed you -- **Officer Coffel** -- in my rear-view mirror.

Greg: According to our story, I've been following Mr. Miller for about 6 miles on Highway 66. I've not activated my overhead lights or otherwise signaled for Mr.

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Miller to stop. I'm just following him. I'm in Mr. Miller's lane of travel – and I'm about 50 yards behind him.

Miller: Ok; let's go **out of role** for a minute. Officer Coffel, out of all the cars on Highway 66 going east, why are you following me?

Greg: You have been picked out based on the training and experience of my task force. About 6-miles back, I was standing in the medium -- between the highways -- when I saw you go by.

Another officer radioed ahead and told me to be on the look-out for you. He saw you stop at a gas station and buy gas and a bottle of water. A number of factors raised our suspicion:

- First, you were traveling east on Highway 66. Based on our training and experience, we know that 66 East is a major drug corridor. Law enforcement agencies often disseminate reports that we can rely on. In this case, we will pretend that our reports state that an unusual amount of drugs are being transported east out 66.
- Second, my partner back at the gas station said that you were driving a rental car. He identified the car as a rental based on the bar code strip on your back door. The bar code strip is what the rental car company scans and uses for accounting purposes. Based on our training and experience, we know that drug traffickers often use rental cars. Why? Because based on our training and experience, we know that drug traffickers prefer to use rental cars because after a drug bust privately owned vehicles can be confiscated. Rentals are generally returned to the rental car agency.
- Third, my partner back at the gas station also said that he saw several air fresheners hanging from your rear view mirror. Based on our training and experience, we know that drug traffickers often use air fresheners in an attempt to mask the odor of their narcotics.
- And fourth, when you passed me our eyes met. Your reaction raised my suspicions. You immediately locked your arms out at the 10 – 2 position of the steering wheel and looked back, straight ahead. That's one

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movement that might be suspicious. Other suspicious movements a trafficker might make include:

- Looking away as he drives by;
- Crossing over to the other lane;
- Or reducing speed.

Tim: Based on those facts can you seize me under the Fourth Amendment?

Coffel: No; not yet. I don't have enough facts to seize you. The facts I have do not rise to a reasonable suspicion that criminal activity is afoot; not yet. But you have definitely raised my curiosity. And I'm going to see if I can gather more facts that will make a seizure reasonable.

Miller: Ok. Let's go back **in role**. Seized or not, I'm scared – really scared. I keep thinking over and over - "This cop on my tail knows the drugs are in my car."

I had almost a full bottle of water before I noticed Officer Coffel, but I slugged that down in about 5-minutes.

Now my mouth is dry. My tongue feels like a ball of cotton. I'm beginning to sweat and I'm having a hard time controlling my breathing. I look more in my rear view mirror than on the road ahead of me.

I keep praying, "Please, just let this cop pass me." But Officer Coffel keeps coming. I see an exit, ahead. I decide to get off the highway. And I pray that Coffel will pass me and just keep going. I begin to merge off the highway. "Oh please don't follow me" I say to myself.

Ok Greg; let's go **out of role** again. What will a drug trafficker do in a situation like this or when cops follow them?

Greg: A drug trafficker may stop and try to talk himself out of trouble. He may run. Or, he may stop and fight. Law enforcement officers need to be ready (and careful) in these situations.

Tim: Alright; let's go back **in role**.

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As I drive up the exit ramp, I look in my rear-view mirror. My worst fear is realized. I see Officer Coffel's right turn signal. He's following me onto the exit ramp.

There's a stop sign at the end of the exit ramp. I stop. A state highway will let me go left, back across Highway 66 -- and to someplace I've never been before. If I turn right, I'll go in the opposite direction -- to the same place. Or I can drive across the highway and stop. There's a gas station right in front of me called the "Gas and Go."

I briefly think about making a run for it. But that just makes my stomach turn into more knots. I decide to drive into the "Gas and Go." My plan is this - if Officer Coffel follows me into the Gas and Go and stops me, I'll try to talk myself out of this mess.

I drive into the Gas and Go and pull up to one of the gas pumps. I get out of the car, pretending not to notice Officer Coffel pulled in behind me. My stomach turns to knots when I hear him say in a conversational tone of voice ...

Greg: "Sir. Can I talk to you?"

Tim: Now I'm certain that I'm going to jail.

Greg: Let's go out of role. I want to emphasize something for our listeners. Mr. Miller is not seized. I have not triggered the Fourth Amendment.

A Fourth Amendment seizure is a significant event. If I seize Mr. Miller, I must be ready to articulate facts -- rising (at least) to a reasonable suspicion -- that criminal activity is afoot.

I concede that I do not have reasonable suspicion; not yet. But I have not seized Mr. Miller, either. And since he is not seized, there is no Fourth Amendment required to articulate why I stopped him.

This is what Mr. Miller called a voluntary contact or consensual encounter. I followed Mr. Miller into a gas station and asked to talk to him. I've done nothing more than any citizen might do.

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In determining whether someone is seized under the Fourth Amendment, the court looks at the totality of the facts and circumstances and asks this question: based on the officer's words and actions, would a reasonable person (in the shoes of Mr. Miller) feel free to leave or otherwise terminate the encounter? In this case, a reasonable person in his shoes should feel free to go or terminate the encounter.

Lets review what I did. I followed Mr. Miller on a public highway into a gas station. In a conversational tone of voice, I asked "Can I talk to you." I made no demands. My overhead lights were not on. And I did not tell Mr. Miller to stop.

Tim: Greg, tell us some factors a court might consider in determining whether someone is seized.

Greg: Sure.

- The Time, Place, and Purpose of the encounter are factors. (Again, our encounter occurred in a public place –a gas station.)
- The words used by the officer. (Again, I only asked to talk.)
- The officer's language and tone of voice are factors. (I asked to talk to you in a conversational tone of voice.)
- The threatening presence of other officers is a factor. (Remember, it's just you and me at the gas station. Moreover, when I pulled into the gas station, I parked behind you. I didn't pen you in.)
- The display of weapons is a factor. (I didn't draw my weapon.)
- Physical touching is a factor. (I have not laid a finger on you; at least, not yet.)
- Retention of the driver's drivers license. (I can ask for your ID, but if you give it to me and subsequently want to leave, I have to make a decision. My decision is whether to give the ID back and let you go or seize you.)
- Another factor is whether told the driver that he did not have to cooperate or answer my questions.

Tim: You did NOT tell me that; you didn't tell me that I did NOT have to cooperate with you.

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Greg: True. I didn't say, "Mr. Miller -- you don't have to talk to me." But I didn't say that you did have to talk to me, either. Telling a suspect that he doesn't have to cooperate in the investigation is not determinative. The issue is whether a reasonable person would feel seized based on the totality of the facts and circumstances.

Tim: I sure feel seized.

Greg: **You** may feel like you have to stop. You may feel like you cannot leave. But we don't look at the facts from **your** perspective. You're a drug trafficker, with a car full of dope.

Drug traffickers are not reasonable people. Their apprehensions and fears are created by their own guilt. And sometimes we can use that guilt against them.

Tim: What can you do during a voluntary contact?

Greg: We teach our students that during a voluntary contact, law enforcement officers may take the following action and, and still not trigger a Fourth Amendment seizure.

- I can display my law enforcement authority. I did that. When I got out of my cruiser and asked to talk to you, I was in uniform and I was driving a marked patrol vehicle. Criminal investigators in plain clothes often display their badges.
- I can ask for your identification. I cannot demand that you give it to me; but I don't have to explain that you do NOT have to give it me, either.
- I can ask for your consent for a search.
- And I can ask you questions that may elicit an incriminating response. You don't have to answer my questions. I cannot force you to answer them; but I can ask. Moreover, I do not have to read you Miranda rights because you are not in custody.

Tim: What are you trying to do during a voluntary contact?

Greg: I'm going to try and confirm or deny my suspicion that you are trafficking narcotics. If I can gather facts rising to a reasonable suspicion that you are

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trafficking narcotics, I can hold you. An investigative detention must be temporary and last no longer than is necessary to confirm or deny the suspicion that you are trafficking. That may be the time necessary to get a drug dog to the Gas and Go and sniff your car. And if I gather additional facts, I may be able to develop probable cause to arrest you. For example, the drug dog may alert and I may find the narcotics in your rental car.

Tim: Thanks, Greg. Let's stop here. When we come back, we'll see if Greg can gather enough facts to build a reasonable suspicion that criminal activity is afoot.